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# In the Supreme Court of the United States.

OCTOBER TERM, 1930

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No. 40

FAWCUS MACHINE COMPANY, *Petitioner*

*vs.*

THE UNITED STATES

---

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

---

## REPLY BRIEF FOR PETITIONER

---

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### I.

### THE REVENUE ACT OF 1918 WAS NOT AN AMENDMENT TO THE REVENUE ACT OF OCTOBER 3, 1917.

The Government's argument is predicated upon the statements that "The Revenue Act of 1918 was in effect an amendment to the Revenue Act of October 3, 1917." (Brief, p. 3) and that "The effect of the 1918 Act is in this respect to amend the Act of 1917; the basis of the tax is substantially identical in both statutes, the only difference being in the rates." (Brief, p. 12).

The Revenue Act of 1918 did not amend but com-

pletely replaced the Revenue Act of 1917. The language of Section 301 (a) of the Revenue Act of 1918 is:

> "That in lieu of the tax imposed by Title II of the Revenue Act of 1917,* * * there shall be levied * * * a tax equal to the sum of the following: * * *."

This expression is very different from the commonly accepted method of amending a statute, which, if applied here, would have read:

> Section 201 of Title II of the Revenue Act of 1917 is hereby amended to read as follows:

A comparison of the excess profits taxes imposed by Title II of the Revenue Act of 1917 and Title III of the Revenue Act of 1918 demonstrates that they differ not only in rates but in practically every other particular. Twenty-five of the most apparent differences are indicated in Appendix I hereto (p. 11).

Section 1400 of the Revenue Act of 1918 reads:

> "(a) That the following parts of Acts are hereby repealed, subject to the limitations provided in subdivision (b):
>
> "* * *
>
> "(3) The following titles of the Revenue Act of 1917:
>
> "Title I (called 'War Income Tax');
>
> "Title II (called 'War Excess-Profits Tax');
>
> "* * *
>
> "(b) Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, * * *: *Provided*, That, except as otherwise provided in this Act,

no taxes shall be collected under * * * Title I or II of the Revenue Act of 1917, in respect to any period after December 31, 1917: * * *."

The purpose of Congress is unmistakable. It completely repealed the excess profits tax titles of the Revenue Act of 1917, rendering them inapplicable to any part of the year 1918 and it substituted *"in lieu"* thereof war and excess profits taxes which differed in rates, in scope, in method of computing invested capital, in every important detail.

It should be noted that while the repeal carries a saving clause, the saving clause is specifically limited and under it no excess profits taxes can be deemed to have accrued under the Revenue Act of 1917 at December 31, 1918. It is of course true that on December 31, 1931 the Revenue Act of 1917 was still in force, but the retroactive repeal leaves us in a situation where for our purposes it can not be deemed to have been in force at any time after December 31, 1917.

## II.

## ARTICLE 845 OF REGULATIONS 45 WAS NOT A PROPER REGULATION UNDER THE REVENUE ACT OF 1918.

The basis of Article 845 is a presumption stated in the first sentence of that article—"For the purpose of computing invested capital, Federal income and war profits and excess profits taxes are deemed to have been paid out of the net income of the taxable year for which they are levied." We respectfully submit that the reasoning of the Board of Tax Appeals in *Appeal of Guarantee*

*Construction Company*,[1] quoted in our brief in support of the petition for certiorari at pages 10 and 11, is sound and that the presumption set up by the Commissioner is erroneous. The Senate Finance Committee, in the language quoted on pages 16 and 17 of our brief in support of the petition, indicated that Congress, fearing the effect of the deduction of 1917 taxes from 1918 taxable income, provided that no such deduction should be permitted. It did not have in mind substituting a deduction of 1918 taxes from 1918 income. If 1918 taxes do not go to reduce 1918 income, neither do they go to reduce earned surplus at the end of 1918 (see Point I of Brief in support of petition), since the taxes were deemed by Congress to be chargeable against the 1919 income except for the denial of the deduction. Earned surplus at the end of 1918 was a proper part of 1919 invested capital unless paid out to stockholders (after the exhaustion of current earnings) by way of dividends.

If 1918 profits were to be reduced by the 1918 taxes, the amount of such reduction would necessarily have to be set up as a reserve for Federal income taxes, such reserve being created by appropriations from surplus by an item that is *not deductible* from income for the purpose of computing the Federal income tax and would create a *true* reserve, being *a true appropriation of surplus*, and, as such, should be restored to surplus like any other true reserve for invested capital purposes the following year.

Assume that a taxpayer at the end of 1918, out of 1918 earnings set up a reserve for depreciation of $10,000.00 which is an *allowable deduction*, and set up a reserve of $10,000.00 for future contingent losses, and set up a

[1] 2 B. T. A. 1145, 1150.

reserve of $10,000.00 for Federal income taxes; the reserve for depreciation of $10,000.00 could not be restored to surplus because it is an *allowable deduction* for income tax purposes. The reserve of $10,000.00 for future contingent losses could be restored to surplus because it is an *unallowable* deduction, and it therefore follows that the reserve of $10,000.00 for Federal income taxes can also be restored to surplus because this item is also an *unallowable* deduction. Just where the line of distinction is drawn between two reserves of this kind we fail to understand. Let us say that a taxpayer on December 31, 1918 purchased $10,000.00 worth of raw materials and stored them in its warehouse and agreed to pay for it March 15, 1919, the following year. Under the theory laid down in Article 845, why does not the Commissioner also compel the taxpayer to prorate out the $10,000.00 during the year 1919 when it becomes due and payable? What is the difference between a liability for merchandise purchased, and a liability for accrued taxes? Why is the one item required to be prorated out of invested capital, and the other item that is just as much accrued, just as much determined to be payable, not required to be prorated out? It should be borne in mind that although Congress specifically prohibited the deduction of income and profits taxes in the computation of taxable net income, *it made no provision that the payment of these taxes should affect invested capital.*

The re-enactment of Section 326 (a) in the Revenue Act of 1921 does not furnish a rule for construing it in computing 1919 taxes. For the purpose of construing the Revenue Act of 1921, we may turn to the previous act from which it was copied and to the intervening de-

partmental construction and assume that the Sixty-seventh Congress in passing the 1921 Act intended to apply for 1921 and subsequent years the construction placed on the 1918 Act by Regulations 45 But this furnishes no clue to the intent of the Sixty-fifth Congress when it enacted the Revenue Act of 1918 in the light of no similar language in prior acts or interpreting regulations.

As shown under Point VII of our brief in support of the petition and in Appendix II to this brief, the function of a Congress is to legislate and not to interpret. It may amend the acts of prior Congresses, it may even for certain purposes amend them retroactively, but it can not, leaving them in effect, interpret them. That is the function of the courts alone. If a *direct* attempt by Congress to interpret a prior act is ineffective, *a fortiori* we can not say that the mere re-enactment of a statute by a subsequent Congress constitutes a controlling or even persuasive interpretation of the prior act.

As the Circuit Court of Appeals for the Second Circuit said in *Shearer* v. *Anderson*, 16 Fed. (2d) 995:

> "Whatever the effect of the departmental interpretation of the later act of 1918 may be on the construction of the same clause re-enacted by still later legislation, it cannot operate retroactively; we are here concerned with rights under the act of 1916. The later views of the department as to the meaning of this act can be at the best but persuasive."

## III

## THE METHOD OF COMPUTATION ADOPTED BY THE COMMISSIONER IN ARTICLE 845 OF REGULATIONS 45 IS UNREASONABLE AND UNJUST.

At the end of 1918 the petitioner had a surplus of $496,609.19[1] which it had accumulated in prior years. Of this amount, $65,220.80 was earmarked as reserved for taxes. But this reserve was part of the statutory invested capital of the petitioner. It represented moneys which had come in to the petitioner either by being paid in or coming in as taxable income and thus becoming capital. They would actually remain in the treasury of the corporation throughout 1919 unless distributed to stockholders as dividends or paid out as taxes. But before any of the reserve had been paid out by way of 1918 income taxes, there were current earnings for 1919 sufficient to meet them (Finding V—Record p. 26). Congress regarded the taxes of one year as normally going to reduce incomes of the next year and based its prohibition of such reductions upon that thought. The logic of reduction of invested capital for taxes paid and for dividends paid is the same, and the Treasury Department has accepted the rule in *Commissioner* v. *Pittsburg Knife & Forge Co.*[2] and *Blair* v. *Ragley Lumber Co.*,[3] which approved the decision of the Board of Tax Appeals in *Appeal of L. S. Ayers & Co.*,[4] in turn based on its decision in *Appeal of Guarantee Construction Co.*[5] (see Point II of brief in support of petition).

[1] Sum of second, third and fourth items on page 15 of record.
[2] 30 Fed. (2d) 683 (C.C.A. 5th).
[3] 30 Fed. (2d) 522 (C.C.A. 5th).
[4] 1 B.T.A. 1135.
[5] 2 B.T.A. 1145.

*Why should a corporation which had earnings in 1918, as yet undistributed, and which has further earnings in 1919 and makes a distribution of dividends and a payment of income taxes on March 15, 1919, be presumed to have paid the dividends out of 1919 income and the taxes out of 1918 income?* The Commissioner originally tried to presume that both were paid out of surplus existing at the beginning of the year. He was overruled with respect to both contentions by the Board of Tax Appeals. Then he misapplied the decision of this Court in *United States* v. *Anderson*,[1] which dealt solely with the adjustment of net income for munitions taxes and had nothing to do with adjustment of invested capital or the treatment of taxes of which Congress had prohibited the deduction.

This hasty construction of the *Anderson* case led to the enactment of Section 1207 of the Revenue Act of 1926, which, as we have shown,[2] only purported to ratify Regulations 45 in so far as the *inclusion* of income and profits taxes in invested capital was concerned. (This is admitted in Point III of the Government's brief, p. 16.) The Commissioner interpreted the new secton as ratifying the previous regulations with respect to both inclusions and exclusions, which was error. The Board of Tax Appeals in *Appeal of Russell Wheel & Foundry Company*,[3] without any reasoning, accepted the Commissioner's interpretation and has followed it blindly ever since. The decision in the *Russell Wheel & Foundry Company* case becomes no more logical through having been followed blindly by the same tribunal in twenty or a thousand cases. All of these decisions of the Board

[1] 269 U. S. 422—cited in the Government's brief as *United States* v. *Yale & Towne Mfg. Co.*

[2] Brief in support of petition, Points VI and VII.

[3] 3 B.T.A. 1168.

and the decision of the Circuit Court of Appeals in *W. S. Bogle & Co. Inc.* v. *Commissioner*,[1] are based on the same ground admitted on page 16 of the Government's brief to be fallacious.

## IV

## TO CONSTRUE SECTION 1207 OF THE REVENUE ACT OF 1926 AS AN INTERPRETATION OF THE 1918 ACT WOULD RENDER IT UNCONSTITUTIONAL.

Although the Government has admitted the inapplicability of Section 1207 of the Revenue Act of 1926 to the present case and has in effect admitted that the Board of Tax Apeals erred in the grounds it adopted for overruling its decision in *Appeal of Guarantee Construction Company*, it goes on to say that nevertheless a construction of Section 1207 as a ratification of Article 845 does not render it unconstitutional. In the light of this modification of the admission, and the Government's attempt to distinguish *Town of Koshkonong* v. *Burton*,[2] we have brought together a number of additional authorities on the question of the right of Congress to assume the judicial function of interpreting statutes. These authorities are indicated in Appendix II of this brief, p. 13.

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[1] 26 Fed. (2d) 771.
[2] 104 U. S. 668.

## CONCLUSION

The judgment of the Court of Claims should be reversed and the cause remanded for judgment in favor of the plaintiff.

Respectfully submitted,

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## APPENDIX I

*Some of the differences between the excess profits tax law contained in Title II of the Revenue Act of 1917 and the excess profits and war profits tax laws contained in Title III of the Revenue Act of 1918.*

The 1917 Act (§ 201) imposed the excess profits tax on corporations, partnerships and individuals; that of 1917 (§ 301) imposed it on corporations only.

The 1917 Act provided rates in five brackets (20%, 25%, 30%, 35%, 60%); that of 1918 provided three brackets (for 1918, 30%, 65%, 80%; for 1919, etc., 20%, 40%).

The 1918 Act provided a special tax (§ 301 (c)) on income from Government contracts, which had no counterpart in the 1917 Act.

The 1918 Act had a provision (§ 302) limiting the maximum tax, which had no counterpart in the 1917 Act.

Section 303 of the 1918 Act made special provision with respect to personal service corporations, which received no special treatment under the 1917 Act.

Section 304 (c) of the 1918 Act exempted net income derived from the mining of gold. This provision had no counterpart in the 1917 Act.

Section 201 (c) of the 1917 Act exempted incomes derived from the business of life, health and accident insurance combined in one policy issued on the weekly premium payment plan, which provision had no counterpart in the 1918 Act.

Section 305 of the 1918 Act provided for reducing the specific exemption for taxable periods of less than a year. There was nothing like this in the 1917 law.

The 1917 Act carried no "war profits tax" and consequently no "war profits credit." The provisions for computing the excess profits credit under the 1917 Act (§§ 203 (a), (b), (c), (d), 204, 205 (a), (b)) were totally different from the provisions for computing the excess profits credit under the 1918 Act (§ 312).

Section 320 (b) of the 1918 Act, providing for a method of computing average prewar income, had no counterpart in the 1917 Act.

The methods of computing invested capital under the two statutes (1918, §§ 325, 326; 1917, § 207) are different: the 1918 Act carrying definitions (§ 325 (a)) of intangible property, tangible property, borrowed capital, inadmissible assets and admissible assets, not paralleled in the 1917 law; the 1918 law providing a method (§ 325 (b)) not paralleled in the 1917 law for treatment of stock having no par value; the 1918 law (§ 326 (a)) considering property paid in at its value at the time paid in while the 1917 law (§ 207 (a)) took the value at January 1, 1914, of any property paid in before that date, the 1918 law (§ 326 (a)) also providing for the treatment of property paid in having a value in excess of the stock issued therefor as paid in surplus, which provision had no counterpart in the 1917 Act; the two statutes providing for quite different treatment of intangible property in invested capital (cf. 1918, § 326 (a) (4); 1917, § 207 (a)); the 1918 Act providing for adjusting invested capital by a ratio of "admissible" and "inadmissible" assets (§ 326 (c)), which had no counterpart in the 1917 law; the 1918 law (§ 326 (d)) carrying a provision for invested capital for fractional parts of years, not paralleled in the 1917 law.

The 1917 law (§ 209) provided a special method of taxing businesses having no invested capital or not more than a nominal capital. There was nothing like this in the 1918 law.

The provisions for "special assessment" contained in Section 210 of the 1917 law and Sections 327 and 328 of the 1918 law were quite different: The duty of trying to determine invested capital was imposed upon the Secretary of the Treasury by the 1917 Act (§ 210) and upon the Commissioner of Internal Revenue by that of 1918 (§ 327 (a)); the 1918 Act (§ 327 (b)) provided special assessment for all foreign corporations, not paralleled in the 1917 Act; the 1918 Act provided for special assessment (§ 327 (c)) in cases of mixed aggregate of tangible and intangible property and (§ 327 (d)) in cases of abnormal conditions working exceptional hardship, which provisions are not paralleled in the Act of 1917; section 328 (b) of the 1918 Act carried a provision for computation where the tax appeared to be more than 50% of the net income, not paralleled in the 1917 Act; and section 328 (c) of the 1918 Act had a provision for records and information to Congress, not paralleled in the Act of 1917.

## APPENDIX II

*Authorities supplementary to Point IV of foregoing brief and Point VII of brief in support of petition for certiorari.*

Section 1207 of the 1926 Revenue Act provides:

> "The computation of invested capital for any taxable year under the Revenue Act of 1917, the Revenue Act of 1918, and the Revenue Act of

1921, shall be considered as having been correctly made, so far as relating to the inclusion in invested capital for such year of income, war-profits, or excess-profits taxes for the preceding year, if made in accordance with the regulations in force in respect of such taxable year applicable to the relationship between invested capital of one year and taxes for the preceding year."

The case of *United States* v. *Heinszen & Co.*, 206 U. S. 370, cited on the Government's brief held constitutional an act of Congress ratifying the collection of duties in the Phillippine Islands under previous regulations established without authority by the President of the United States. As to the *Heinszen* case the following distinction has been made: In that case prior tax laws were not *construed*. The remedial act only made assessment and collection under prior tax laws enforceable without changing the construction of the tax laws themselves. Legislation which legalizes and renders collectible a tax previously invalid and uncollectible and merely supplies means by which payment may be enforced may be distinguished from legislation construing prior laws or reversing a construction already placed upon a tax law by the courts. (Compare cases like *United States* v. *Heinszen, & Co.*, *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, and *Charlotte Harbor Ry. Co.* v. *Welles*, 260 U. S. 8, cited on the Government's brief with the cases cited below and the *Salberg* and *Town of Koshkonong* cases cited in our brief in support of the petition.)

Apparently where the illegality of a tax arises solely from legislative failure to delegate the necessary authority to carry it into effect, a subsequent ratification is not

an usurpation of a judicial function and makes the statute effective *ab initio*. It merely confirms the law without determining its effect.

Section 1207 of the 1926 Revenue Act does not, like the statute involved in the *Heinszen* case, "legalize and ratify the collection" of the tax "the same as if the same had by prior act of Congress been specifically authorized and directed." We submit that the section amounts to no more than a legislative adoption of an administrative construction of prior legislative acts, leaving them in full force and effect without attempting to modify, alter or repeal them. There is no enacting language in the section.

The Treasury Department rulings may not alter, amend or extend a statute.

*Edwards* v. *Keith*, 231 Fed. 110;

*Munro Cider Vinegar & Fruit Co.* v. *Riordan*, 280 Fed. 624;

*Van Dyke* v. *City of Milwaukee*, 159 Wis. 460;

*Greenport Basin & Construction Co.* v. *U. S.*, 269 Fed. 58;

*De Laski* v. *Iredell*, 268 Fed. 377;

*Cryan* v. *Wardell*, 263 Fed. 248.

The following cases are cited as sustaining our contention that one Congress cannot *interpret* the Act of a prior Congress:

*Ogden* v. *Blackledge*, 2 Cranch 272, wherein the following appears in the report of the argument by counsel:

> "But the legislature of North Carolina passed a law in 1799 (c. 26), which declares, in substance,

that notwithstanding the 6th section of the act of 1789, the 9th section of the act of 1715 was not repealed. This, however, cannot affect the present case, for this action was brought in October 1798, before the law of 1799 was passed. But even if it had been brought after the law of 1799, that act could not alter the past law, and make that to have been a law which was not law at the time. To declare what law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separated from the judicial.

"The Court stopped the counsel, observing that it was unnecessary to argue that point."

The above statement from the report in the *Ogden* case is given judicial recognition in *Koshkonong* v. *Burton*, 104 U. S. 668, 678, and other cases cited below. The court in the *Ogden* case must have disregarded the explanatory act of 1799, or its judgment would have been different.

*Union Iron Co.* v. *Pierce*, Fed. Cas. No. 14,367, 24 Fed. Cas. 583, 4 Biss. 327, involving the construction of a statute providing officers neglecting to make required reports annually shall be individually liable for corporate debts contracted by them. The amendment provided that the word "annual" as used in the prior act "shall be construed to mean once a year after such company has been doing business at least twelve months." The court stated:

"It is urged that this legislative construction must govern us. There can be no doubt that the legislature intended, in passing this amendment, to assume the power to construe the 13th section

of the act proposed to be amended; and it is equally certain that the Indiana legislature can exercise on such power. The constitution of this state separates the powers of the state government into three departments—the legislative, the executive, and the judicial—and it prohibits each of these departments from exercising the powers conferred on either of the others. Now, to make a law is a legislative function, which no court can assume; and the construction of a law already made is a judicial act, which no legislature can constitutionally perform. The amendment in question is a judicial act in so far as it attempts to declare the meaning of the term 'annually' as it occurs in the 13th section of the old act. This amendment may operate as a future rule on subsequent transactions but it cannot operate retrospectively and on past events. It is a well-established rule of American jurisprudence, that all declaratory laws, as such, are unconstitutional."

*Postmaster-General* v. *Early*, 12 Wheat. 136 at 148, involving the jurisdiction of the federal courts, wherein the court stated:

"It has been said, and perhaps truly, that this section was not framed with the intention of vesting jurisdiction in the Circuit Courts. The title of the act, and the language of the sentence, are supposed to concur in sustaining this proposition. The title speaks only of State and District Courts. But it is well settled, that the title cannot restrain the enacting clause. It is true that the language of the section indicates the opinion, that jurisdiction existed in the Circuit Courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law, does not make law.

But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future."

*Wheaton* v. *Peters,* Fed. Cas. No. 17,486, 29 Fed. Cas. 862, at 866, 33 U. S. (8 Pet) 725 wherein the court stated:

"a single sentence in the case of Postmaster *v.* Early, 12 Wheat. 148, has been relied on; the chief justice there says, 'it is true that the language of the section indicates an *opinion* that the jurisdiction *existed* in the circuit courts, rather than an *intention* to give it; and a mistaken opinion of the legislature concerning the law does not make law.' There is nothing but what is perfectly reasonable and familiar in this principle, and we can hardly suppose it was unknown to or disregarded by Judge Washington in the case of Ewer *v.* Coxe."

*Kern* v. *Supreme Council American Legion of Honor,* (Mo.) 67 S. W. 252, at 255, wherein the court stated;

"The act of March 8, 1881, is the only act that ever exempted foreign fraternal societies from the general insurance laws. It created such exemption for the first time, and, notwithstanding the recital in the emergency clause thereof, it was not simply a declaratory act, but was a creative act. That act was passed by the 31st general assembly, and it was not competent for that body by a declaratory act to ascribe a meaning or intention to the acts of March 8, 1879, or May 19, 1879, which the 30th general assembly had not expressed in those acts. The 31st general assem-

bly had power to prescribe what the law should be thereafter, but it was the province of the courts, and not of that session of the assembly, to say what the law was before that time. In other words, all laws must be prescribed by law-making power, and it is not within the power of a later assembly to declare that a prior assembly meant something it did not say in the laws enacted by it. The third point made by the defendant therefore also fails."

*City of Oakland* v. *Oakland Waterfront Company*, (Cal.) 50 Pac. 277, holding nugatory an act attempting as against rights that had vested meantime to re-define the boundary of a city fixed by a prior act.

Cooley's Constitutional Limitations, Eighth Edition, Volume One, page 191, stating:

> "As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. 'To declare what the law *is or has been* is a judicial power; to declare what the law *shall be*, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial.' "

*Lindsay* v. *United States Savings & Loan Co.*, (Ala.) 42 L.R.A. 783, at 786, 24 So. 171, holding nugatory as to "premiums heretofore taken" by building and loan associations an act providing premiums heretofore or hereafter taken shall not be treated as interest nor render such association amenable to the laws relating to usury, wherein the court stated:

> "The enactment is its own expositor. Without repeal or modification of the statutes relating to interest and usury,—the statutes to which the former decision declared these transactions were offensive,—the enactment intervenes, and declares that, as to past or future transactions, they must not be so regarded. In form and words the enactment is not directed as a mandate to the courts, but it is without force or meaning, unless the courts depart from the former construction of the statute, and yield obedience to it. It is, of consequence, that which is known as an 'expository act.' Of such statutes it is said by Judge Cooley: 'As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. 'To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial.' "

*Bassett's case*, 2 Court of Claims 448, in which it was held that an amendatory act of Congress, providing

> "That the act entitled 'An act to increase the pay of soldiers in the United States Army, and for other purposes,' approved June 20, 1864, shall not be so construed as to increase the emoluments of the commissioned officers of the army at the date of its passage.' "

could not be effective to decrease pay earned prior to its passage, the Court stating:

"This clause in form directs as to the construction of the act of 1864, and to construe acts is the province of the judiciary. In The United States *v.* Dickson, 15, P., 141, the Supreme Court of the United States decided that 'the judicial department must determine the construction of all laws involved in cases before them according to their own views.' " (Curtis's Digest, p. 104.)

*The People, ex. rel. The Mutual Life Insurance Company of New York* v. *The Board of Supervisors of the City and County of New York*, 16 N. Y. 424 involves a taxation statute and therefore is of special interest. The Court stated:

"On the 24th March, 1855, a law was enacted declaring that the mutual companies incorporated prior to the general act should be subject to taxation on the sum of one hundred thousand dollars, 'and no more'. It was added, 'and it is hereby declared that such was the intention, and it is the true construction of said act, of June 29th, 1853, in regard to any taxes imposed on said companies after said act took effect.' (Laws of 1855, ch. 83.) All the judgments of the Supreme Court now under review were rendered at the special term before the enactment of this statute.

"The act in question, considered as a persuasive argument for a particular construction of the statute of 1853, loses much of its weight from the consideration that the legislative bodies had been renewed in the interval between the two enactments, and that but a few of the members of the legislature of 1853 sat in that of 1855; but if this were otherwise, we should feel constrained to rely upon the language of the statute which we are

called upon to interpret, rather than any personal assurance as to the intention of its members. The acts of the legislature do not rest in any respect upon oral tradition. They are committed to writing, and it is by the written language that their sense is to be ascertained. As an authoritative mandate in favor of the construction claimed by the insurance company we cannot accord to it any force whatever. In the division of power among the great departments of the government, the duty of expounding written laws has been committed to the judiciary. The legislature has no judicial power, and cannot upon any pretence interpose its authority respecting questions of interpretation pending in the courts. (Dash *v.* Van Kleeck 7 John., 477: Ogden *v.* Blackledge, 2 Cranch, 272.) We do not suppose that the legislature had any such design in passing this act. They had ample power to introduce a new rule upon this subject, and that rule I conceive might be made in a limited sense retrospective. As no vested private rights of individuals were disturbed, and the authority of the legislature over the subject of taxation was plenary, the new rule might, if considered expedient, be made applicable to questions of assessment depending before the administrative boards. This was probably all that was intended in this instance. We do not assume that it was designed to dictate to the courts, for this was not within the competency of the legislature; and beside, the act would have full effect if restricted in the manner I have suggested."

*United States* v. *Chong Sam*, 47 Fed. 878, at 886, involving the construction of a Federal Chinese Exclusion Act wherein it is stated:

"To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative. Ogden *v.* Blackledge, 2 Cranch, 272, 277; Koshkonong *v.* Burton, 104 U. S. 668, 678; In re Landsberg, 11 Int. Rev. Rec. 150; Cooley, Const. Lim. pp. 93, 95, and cases cited."

*State Ex. rel. Rodwell* v. *Harrison,* (N. C.) 43 Southeastern 540. In this case a State statute provided that the election for the town of Littleton should be held annually on the first Monday in May. A subsequent act repealed this provision declaring that in all towns an election should be held on Tuesday after the first Monday in May 1901 and biennially thereafter. Notwithstanding this repeal an election was held in Littleton on the first Monday in May, 1902. Thereafter in 1903 a statute was passed declaring that it had been the intention of the general assembly in 1901 to except Littleton from the general Act relative to municipal elections and that consequently the election was valid. The Court held that the Act of 1903 could not be regarded as binding on the Courts with respect to a controversy relative to the validity of the election which arose prior to its passage, citing the Ogden case.

*In re Landsberg,* Fed. Cas. No. 8041, 11 Int. Rev. Rec. 142, 150, in which it was held that an Act of Congress providing that the provisions of a previous Act "shall be so construed as not to affect any right of suit or prosecution which may have accrued under any prior acts of Congress repealed" providing for the recovery of penalties and forfeitures arising under the customs laws was obnoxious as to two fatal objections:

"(1) It is an exercise of a power purely judicial in its character. Upon a question very much like the present in the U. S. Supreme Court, Chief Justice Marshall clearly stated the rule as follows: 'To declare what the law is, or has been, is a judicial power; to declare what the law shall be is legislative.' Ogden *vs.* Blackledge, 2 Cranch (6 U. S.) 272, 277. The previous act itself, is permitted to stand unaltered and unamended. Congress assumes the power simply to expound and construe it; a power purely and undoubtedly judicial. What the law was before the explanatory act, it was permitted to be after, and is today. To declare its meaning and application belongs exclusively to the judicial tribunals, and not to the legislature. It cannot be said that the act is prospective merely, and simply declares what the law shall be in the future, because by its express terms it relates exclusively to penalties and forfeitures previously accrued, and under laws which no longer had any existence. There could not be any future cases arising under those laws, from the very nature of the case. It is true that, upon a question of real doubt as to the meaning of a particular statute (which, however, is not this case), a legislative construction, if deliberately given, is entitled to much weight, although even then it is not conclusive upon the judicial tribunals. See Sedg. St. & Const. Law, 252, 253; Cooley, Const. Lim. 94; Coutant *v.* People, 11 Wend. 511, 513.

(2) The act of February 18, 1867, is in the nature of an ex post facto law."

*United States* v. *Mammoth Oil Co.*, 5 Fed. (2d) 330, at 353.

"Little weight can be attached to any declaration of policy by Congress a considerable time after the act was passed, especially in view of the fact that reports concerning fraud surrounding the lease reached the ear of Congress, and disturbed the equilibrium of that body, perhaps justly so, because of having no way to legally determine the matter in which it was deeply concerned. That function is vested in the courts. Koshkonong *v.* Burton, 104 U. S. 668–678 (26 L. Ed. 886).

"When counsel, in Ogden *v.* Blackledge, 2 Cranch, 272, 277, announced that to declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point.' "

*Rockhold* v. *Canton Masonic Mut. Ben. Soc.*, (Ill.) 21 N. E. 794, in which the Court held for the defendant in an action to recover a sum claimed to be due upon beneficiary's certificate of membership issued by the defendant to the plaintiff. The legislative Act authorized the formation of corporations not for pecuniary profit excluding therefrom corporations for the purposes of banking and insurance. Another Act regulating life insurance made no exception in any of its provisions as to any clause of life insurance. By a subsequent enactment the legislature provided:

" 'Associations and societies which are intended to benefit the widows, orphans, heirs, and devisees of deceased members thereof, and where no annual dues or premiums are required, and where the

members shall receive no money as profit or otherwise, shall not be deemed insurance companies.' "

* * * * *

The Court held:

> "It may be conceded that this language is in form expository, but the legislature cannot instruct the judiciary how to construe certain statutes, any more than the judiciary can instruct the legislature what statutes it shall enact. Ogden *v.* Blackledge 2 Cranch 272; Ashey case 4 Pick. 23. But we concede that, in determining the meaning of obscure clauses in statutes, it may often be important to look into other enactments by the same legislature, having reference to the same subject-matter, as showing the sense in which the language was evidently employed; but it is manifest that the enactments of a subsequent legislature, composed of different members, could have no more value in that respect than the acts of any other department of government. There are here no contemporaneous enactments of the general assembly of 1869 having the slightest bearing upon the question of life insurance, nor are there any contemporaneous enactments of the general assembly of 1872 throwing light upon the corporative act of that year. We must therefore assume that the general assembly of 1874 knew what we hold, namely, that insurance by members of benevolent societies of each other upon the assessment plan for the mutual benefit of themselves, or of their respective widows, orphans, heirs, or devisees, is life insurance, within the meaning of the original act of 1869."

*State* v. *Harden* (W. Va.), 58 S. E. 715, at 731, wherein it is stated:

" 'The Legislature cannot authoritatively declare what the law is or has been. That is a judicial function and pertains to the Court.' Lewis' Suth. Stat. Cons. 358, p. 683; Ogden *v.* Blackledge, 2 Cranch (U. S.) 272, 2 L. Ed. 276; South Ottowa *v.* Perkins, 94 U. S. 260, 24 L. Ed. 154; in re Hanley's Estate, 15 Utah, 212, 49 Pac. 829, 62 Am. St. Rep. 926, 931; Ratcliffe *v.* Anderson, 31 Grat. (Va.) 105, 31 Am. Rep. 716, 'It is always competent to change an existing law by a declaratory statute, and, where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made, for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts.' "

*Baird* v. *Burke County, et al.* (N. Dak.), 205 N. W. 17, at 19–20, involving taxes, wherein the court stated:

"It is too clear for argument that one purpose of chapter 300 was to construe prior legislation. The construction of statutes is distinctly a judicial function; the duty of making the law or of declaring what it shall be is a legislative function. The division of powers of government into legislative, executive, and judicial, lies at the very foundation of our constitutional system. It has been the belief of constitutional lawyers, as it was of those who laid the foundations of the govern-

ment, that such separation of powers was wise and best calculated to preserve the liberty of the individual against unwarranted encroachments. Each branch under this constitutional theory of departmental division is intrusted with distinct powers and duties; one branch may not assume to perform the functions intrusted to another. The executive, although possessing the power of veto, cannot legislate; the Legislature possesses no judicial or executive power and may not undertake either to enforce existing laws or to declare their meaning so as to bind the executive or the judiciary; and the judiciary possesses no power, either of legislation or of executive administration of existing laws. Cooley's Constitutional Limitations (7th Ed.) 136–140. See, also, People *v.* Board, 16 N. Y. 424; Weisberg *v.* Weisberg, 112 App. Div. 231, 98 N. Y. S. 260. We are constrained to the conclusion, therefore, that the action of the Legislature of 1923, purporting to construe the statutes of 1917 and 1919 as a blunder, in attempting to give a meaning to words contrary to their ordinary and natural import, and in impliedly criticizing prior Legislatures, is of no effect, and not binding upon any other branch of the government, or upon this court. 12 C.J. 811. To hold otherwise would be to exalt the Legislature above the other departments of government, to make it supreme, and in a large measure put an end to the security of liberty and property."

*State* v. *Parsons*, (Iowa) 220 N.W. 328, at 331, wherein the court stated:

"However, the Legislature has no power to direct the judiciary in the interpretation of existing statutes. State *v.* Schlenker, 112 Iowa, 642,

84 N.W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360. While a legislative construction of an act is entitled to due consideration from the courts, it is in no sense binding on the courts."

*In re Coburn*, (Cal.) 131 Pac. 352, at 355:

> "In 1891 the Legislature added section 1767,—which declares that 'the phrases "incompetent," "mentally incompetent," and "incapable," as used in this chapter, shall be construed to mean any person, who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted to properly manage and take care of himself or his property, and by reason thereof, would be likely to be deceived or imposed upon by artful or designing persons.'
>
> * * *
>
> The weight of authority supports what we think to be the true rule, i.e., that such declaratory or defining statutes are to be upheld, except with regard to past transactions, as an exercise of the legislative power to enact a law for the future."

*Macartney* v. *Shipherd*, (Ore.) 117 Pac. 814, at 817, holding unconstitutional an act which recited that certain code sections had created doubts whether the time to take an appeal ran from entry of judgment or of order granting or denying a new trial, and which provided appeals filed within six months after denial of motion for a new trial should be validated. The court stated:

> "In Griffin *v.* Cunningham, 20 Grat. (Va.) 31, the Supreme Court of Virginia quotes with approval the language of Judge Cooley as follows:

'To declare what the law is or has been is judicial power; to declare what the law shall be is legislative.' "

*People* v. *Ganly*, 156 N. Y. S. 670, at 674–5, involving a question as to whether a statute requiring county clerks to pay fees to the treasury of the State of New York applied to a certain county. The court stated:

> "It is urged, however, that the Legislature has given a different construction to the acts above referred to, by adopting in 1915 an amendment to section 103 of the Executive Law, by which the words 'Bronx County' are actually written into the act.
>
> * * *
>
> "The most that can be said of the act is that, even if the Legislature of 1915 had construed the act of 1909 in a contrary sense to that which we adopt, that construction would not be of binding force, for it is the courts who must finally decide the proper meaning an construction of statutes."

*Merlo* v. *Johnston City & Big Muddy Coal & Mining Co.* (Ill.), 101 N. E. 525, at 527, wherein it is stated:

> "Whether a given act of the Legislature repeals a former one, and, if so, to what extent, is a judicial question, and a legislative declaration that an act is or is not repealed is only a declaration of the legislature upon a judicial question, which is not binding on the courts."

*United States* v. *Claflin*, 97 U. S. 546, at 548–9, wherein it is stated:

"In sect. 5596 it was thus enacted:

'All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu therof; all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general or permanent in their nature.'

"As a portion of the act of 1823 was carried into the Revised Statutes (see sect. 3099), and the second section was not, that section was covered by the repealing clause, unless it had been repealed before. But that clause indicates a belief on the part of Congress that it had been previously repealed, and, doubtless, that it was repealed by the act of 1866. The indication is found in the words that declare all parts of acts not contained in the revision, but other portions of which are, to have been repealed or superseded by subsequent acts. This, however, though entitled to great respect, ought not to be considered as more than an expression of opinion or a recital of belief. It is *not in the form of an enactment.* It is not a declaration of congressional will. It is not a rule for the future. It certainly is not conclusive that the second section was repealed or superseded by the act of 1866, or by any other act prior to the enactment of the revision. Whether a statute was repealed by a later one is a judicial, not a legislative question. And even a declaratory act, or an act directing how a former act shall be construed, is inoperative on the past, though controlling in future. *Postmaster-General* v. *Early,* 12 Wheat. 136." (Italics ours)

*The Governor* v. *Porter,* 24 Tenn. (5 Humph.) 164, at 166–8, wherein it is stated:

"By the 1st section it is enacted 'that the 1st and 2d sections of said act (referring to the act of 1835), which require bonds to be executed by sheriffs and their securities for the proper collection and payment of the State and county revenue, shall be construed to require said bonds to be given hereafter every year.'

* * *

"To the legislature belongs the power of enacting such laws, within the limits of the constitution, as the policy of society and its varying interests may seem to require. But, after their enactment, it is then the province of the judiciary to ascertain their meaning, and determine upon their construction. Any other doctrine would destroy the checks contained in the Constitution against the abuse of power, and tend to a concentration of all power in a single department of the government. It is unnecessary to dwell upon this point farther than merely to say the Legislature of 1835 enacted a law in reference to the collection of the revenue. That of 1839–40, *without repealing that law or enacting a different one* so far as the first section of the act is concerned, which we are now considering, which it was perfectly competent for them to do, undertake to say what is the meaning of the former law, and to decide upon its construction. This we think was beyond their power."

*Haley* v. *City of Philadelphia*, 68 Penn. 45, at 47:

"The only other question which can arise upon this record, is as to the effect of the Act of April 21st, 1869, Sec. 9, Pamph. L. 1194. This section is a legislative declaration that the true intent and meaning of the Acts of 1867 and 1868 were, 'that

no interest shall be allowed on damages for ground taken up to the time of their payment on the issue of any warrant for their payment by the city of Philadelphia.' * * * It would be monstrous to maintain that where the words and intention of an act were so plain that no court had ever been appealed to for the purpose of declaring their meaning, it was therefore in the power of the legislature by a restrospective law to put a construction upon them contrary to their obvious letter and spirit. Reiser *v.* The William Tell Saving Fund Association, 3 Wright 137, is an authority in point against such a doctrine. An expository Act of Assembly is destitute of retroactive force, because it is an act of judicial power, and is in contravention of the 9th section of the 9th article of the Constitution, which declares that no man can be deprived of his property, 'unless by the judgment of his peers or the law of the land.' "

*Planters' Bank of Tennessee* v. *Black*, *10 Miss.* (11 Smedes & M.) 43, at 50–1:

"To obviate the force of this statute, the defendants rely on an act approved 19th February, 1846, entitled an act to settle the construction of the 13th section of an act entitled an act to amend the several acts of limitations, approved February 24th, 1844. This statute directs, 'that the 13th section of the above cited act shall not be so construed, as to affect the right or impair the lien of any judgment where the plaintiff therein, or other person interested, has been prevented from levying his execution by reason of a preceding levy, under and by virtue of an execution emanating on a junior judgment; and when the

officer thus levying such junior execution fails, refuses or neglects to sell the property thus levied on, on or before the 24th February instant, provided said judgment has been enrolled according to existing laws.'

"It is insisted in argument that this law is unconstitutional. The right of the legislature to repeal, alter or modify a law, is not questioned; but it is urged, that, upon its face, this is a legislative construction of a previous statute, and that the right to construe laws belongs to the judicial department of the government. Nothing is more clear than that it is beyond the scope of legislative authority, to put a construction upon its laws which can be obligatory upon the courts. The province of the legislature is to enact laws, that of the court to expound or interpret them."

*Commonwealth* v. *Warwick*, (Pa.) 33 Atl. 373, 375. A statute provided when a legislative officer should be incapable of holding office his place should be filled by a joint vote of the city councils until the next city election. A subsequent act provided that the words "next city election" should be construed to mean the election at which the voters would elect a successor in office had no vacancy occurred therein. The court held the later statute unconstitutional, stating:

"The practical effect of the act of 1867 in the present case would be to compel this court of 'construe' the expression 'the next city election,' used in the act of 1854, to mean not the 'next' but the 'next but one.' It was clearly beyond the legislative power to thus usurp judicial functions, or to distort language."

*Titusville Iron Works* v. *Keystone Oil Co.*, (Pa.) 15 Atl. 917, holding nugatory as an usurpation of a judicial function a statute declaring that provisions of prior acts involving mechanics' liens shall be construed to include claims for all labor done "no matter at whose instance or upon whose credit it was done."

*Ogden* v. *Nash*, 3 No. Car. 266 (2 Hay. 277), where an act provided that a prior statute prescribing the limitation period for making claims against estates of decedents has continued and shall continue in force. The court stated:

> "The separation in these powers has been deemed by the people of almost all the States, as essential to liberty And the question here is, does it belong to the judiciary to decide upon laws when made, and the extent and operation of them; or to the Legislature? If it belongs to the judiciary then the matter decided by this act, namely, whether the act of 1789 be a repeal of the 9th section of 1715, is a judicial matter and not a legislative one. The determination is made by a branch of government, not authorized by the constitution to make it; and is therefore in my judgment void."

*Houston* v. *Bogle*, 32 No. Car. 357 (10 Ire 496), wherein the court stated:

> "It is settled that the Legislature cannot pass any declaratory law or act declaring what the law was before its passage, so as to give it any binding weight with the courts."

*Lincoln Building and Saving Association* v. *Graham*, 7 Neb. (Brown) 173, at 179–80, involving usury statutes, wherein the court stated:

"Section three legalizes 'all contracts and loans made by any corporation or association already formed,' under chapter XXV of the Revised Statutes of 1866, with any member thereof, and section four defines what 'shall be deemed in law a waiver of anything in such contract or loan that might be deemed usurious in the same under the laws of this state, at the time the same was made and securities given.'

* * *

"The two sections referred to are not in the nature of a declaratory statute, nor are they in the nature of a curative act; but they purport to be an interpretation of former laws, and are substantially in the nature of a mandate to the courts to construe and apply the former laws, not according to judicial, but according to legislative judgment. * * * the powers of the legislature are to enact laws, not to expound them; and the powers of the courts are to interpret the law, declare what it is, and apply it to cases as they arise."

*Gough* v. *Pratt*, 9 Maryland 526, at 532–3, wherein the court stated:

"It has been said, by the appellee, the Circuit Court of the United States, in the case referred to, were wrong in holding a security given for a gambling debt to be void in this State. He contends the decision was based upon the idea that the statute of *9th Anne, ch.* 14, was then in force here, when, in fact, it was not. The act of 1813 ch. 84, he says, does not make *void* such securities as the present, but simply provides, they shall not be 'demandable or recoverable before any court of justice;' and not being absolutely *void*,

but only *voidable*, if resisted in proper time, a court of equity, after a judgment at law, could not prevent the claimant from demanding payment.

* * *

"But we see nothing in this, or any previous law, which, either in express terms or by necessary implication, repeals the statute of *Anne*. Should it be conceded the laws relate to the same matters, they are not so inconsistent as to require that the statute should be considered as repealed by our legislation. And in reference to whether a suit could or could not be maintained upon a security given for a gambling consideration prior to the act of 1813, if the proviso of that act has any relation to such securities, it can only be regarded as a legislative interpretation of what was the previous law on the subject; which interpretation is not binding upon us, unless we think it correct, which we certainly do not."

*City of New Orleans* v. *Louisiana Mutual Insurance Company*, 26 La. Ann. 499, involving tax statutes. The state court had held in a prior case that under the state revenue law of 1872 an insurance company paying a state license tax is also liable for a municipal tax on "merchandise, capital and money at interest", in spite of a section of the License Tax Act providing "no insurance company whose license tax shall be $1,000. shall be liable to any assessment—state, parish or municipal throughout the state—other than that imposed by this article and section 6 of this act." Act No. 57 of the 1874 Louisiana General Laws provided:

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the true intent and meaning of the fifteenth paragraph of the first section of the revenue law of 1872, act No. 14, approved March 5, 1872, is that the payment of one thousand dollars tax by and insurance company incorporated under and doing business by or under the laws of this State, shall be deemed a full quittance for all taxes imposed by State, parish or municipal authority for the year for which said one thousand dollars license is paid, except taxes on real estate owned by said company.

SEC. 2. *Be it further enacted, etc.*, That this act shall take effect from and after its passage."

The court followed the decision in the previous case in spite of the amendatory act, stating:

"If the act of 1874 was to interpret the acts of 1871 and 1872, as seems to be its purpose, it is unconstitutional, because trenching upon the jurisdiction of the judiciary. To interpret laws is not within the powers of the General Assembly; it is not a legislative, but a judicial function.

"It is therefore ordered that the judgment appealed from be affirmed with costs."

Other cases of interest are:

*In re Handley's Estate* (Utah), 49 Pac. 829 at 831;

*Respublica* v. *M'Clean*, 4 Yeates 406;

*Reiser* v. *William Tell Saving Fund Association*, 39 Pa. St. 137, at 144.